Teamsters Local 559, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Mashkin Freight Lines, Inc.) *and* John Catania, Jr. Case 1–CB–4009

July 21, 1981

SUPPLEMENTAL DECISION AND ORDER

On January 29, 1981, Administrative Law Judge Raymond P. Green issued the attached Supplemental Decision in this proceeding.[1] Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent that they are consistent herewith.

Respondent contends that the backpay award in the instant case is punitive and therefore prohibited because it was assessed without any determination as to the merit of the grievance. We agree with the Administrative Law Judge that the determination of the validity of the grievance in the instant case is required to facilitate determination of monetary responsibility. As we have done in the past when faced with similiar situations, we find it is proper to resolve the question concerning the validity of the grievance in favor of the injured party, not the wrongdoer. Therefore, for the purpose of allocating monetary responsibility, we will presume that, if Catania's grievance had been fully and fairly processed, it would have been found meritorious and he would have been reinstated with backpay. *Service Employees International Union, Local No. 575, AFL–CIO (Convacare of Decatur d/b/a Beverly Manor Convalescent Center)*, 229 NLRB 692 (1977), and *Local Union No. 2088, International Brotherhood of Electrical Workers, AFL–CIO (Federal Electric Corporation)*, 218 NLRB 396 (1975). Accord: *Abilene Sheet Metal Contractors Association and Abilene Sheet Metal, Inc.*, 236 NLRB 1652 (1978), enfd. in relevant part 619 F.2d 332 (5th Cir. 1980).

In support of its position, Respondent relies on our decision in *Glass Bottle Blowers Association of the United States and Canada, AFL–CIO, Local No. 106 (Owens-Illinois, Inc.)*, 240 NLRB 324 (1979). Respondent reads that decision to suggest that backpay will not be ordered absent an indication that an employer is unwilling to reopen a grievance which would otherwise be barred for lawful reasons. We disagree. Rather, the burden in that circumstance is on the wrongdoer to show that the barred grievance will be properly and promptly entertained by the employer. Upon such a showing, the Board may find it proper to refrain from making a backpay award but to retain jurisdiction over the entire case pending a proper and prompt resolution of the grievance.

The Administrative Law Judge also found that the offer of employment extended to Catania by Wonder Bread was substantially equivalent to the position Catania held with the Employer, Mashkin Freight Lines, Inc., and therefore tolled Respondent's liability for backpay as of the date the offer of employment was extended. The General Counsel excepted to this finding, contending that, because the wages offered to Catania by Wonder Bread were significantly lower than the wages he had earned in his previous position with the Employer, the two jobs were not substantially equivalent. We agree with the General Counsel.

The parties stipulated that, during the period Catania was employed full time at Mashkin, he worked 8 to 12 hours per day and earned about $600 per week. The parties further stipulated that Catania's earnings at Mashkin for the calendar year 1978 would have been $30,599. In contrast, Respondent presented evidence which indicated that an individual with 5 or 6 years' seniority at Wonder Bread, who performed the same work Catania was offered, earned $19,900 during the calendar year of 1978. The wages offered by Wonder Bread were thus one-third less then the wages Catania earned at Mashkin. We view this difference as substantial and therefore find that the position offered to Catania by Wonder Bread was not substantially equivalent to the position Catania held at Mashkin. Thus, Respondent's backpay liability was not tolled in August 1978, but rather extends until May 21, 1979, the date Mashkin extended a valid offer of reinstatement to Catania.

Furthermore, because the Administrative Law Judge tolled Respondent's backpay liability as of August 1978, he did not rule on the issue of whether Catania's earnings from moonlighting at Newington Trailer Training Center in 1979 are properly includable as interim earnings. After reviewing all the evidence, we conclude that Catania's employment at Newington Trailer Training Center in 1979 was in the nature of a second job. Specifically, Catania's work there was performed only on Sundays and no evidence was presented that he worked for Mashkin on Sundays. Therefore, as earnings during hours that a discriminatee would not have worked for the employer are not charged to interim earnings, we shall exclude Catania's earnings at New-

[1] The Board's original Decision is reported at 243 NLRB 848 (1979).

ington Trailer Training from our backpay calculation. *Carter of California, Inc., d/b/a Carter's Rental*, 250 NLRB 344 (1980), and *Aircraft and Helicopter Leasing and Sales, Inc.*, 227 NLRB 644 (1976).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Teamsters Local 559, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Newington, Connecticut, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the backpay grand total to be paid to John Catania, Jr., shall be $32,486.91 and the total pension contribution due and owing is $2,553.52.[2]

APPENDIX*

CALENDAR QUARTERS	*GROSS BACKPAY*	*NET INTERIM EARNINGS*	*NET BACKPAY*	*MEDICAL EXPENSES*	*TOTAL*	*PENSION CONTRIBUTIONS*
1977-3	$ 749.79	$ 0	$ 749.70	$ 0	$ 749.79	$ 63.80
1977-4	6,906.84	643.00	6,263.84	343.25	6,607.09	326.25
1978-1	7,419.52	1,119.00	6,300.52	279.50	6,580.02	322.82
1978-2	7,587.74	293.41	7,294.33	0	7,294.33	404.75
1978-3	7,713.18	3,727.03	3,986.15	0	3,986.15	343.15
1978-4	7,878.09	4,550.00	3,328.09	0	3,328.09	404.15
1979-1	7,680.20	6,050.00	1,630.20	0	1,630.20	447.20
1979-2	4,841.24	2,530.00	2,311.24	0	2,311.24	240.80
TOTALS	50,776.60	18,912.44	31,864.16	622.75	32,486.91	2,553.52

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge: This case was heard before me in Hartford, Connecticut, on August 14 and 15, 1980, pursuant to a backpay specification and notice of hearing which was issued by the Regional Director for Region 1 on February 29, 1980. At the hearing all parties were afforded a full opportunity to be heard and to present evidence on the issues. Upon consideration of the entire record, including consideration of the briefs filed by the parties, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. BACKGROUND

On July 31, 1979, the National Labor Relations Board, based on an unfair labor practice charge filed on February 2, 1978, issued a Decision at 243 NLRB 848, finding that Respondent unlawfully failed and refused to represent John Catania, Jr., concerning a grievance relating to his discharge on September 8, 1977, for absenteeism by Mashkin Freight Lines, Inc.[1] The Board adopted the Administrative Law Judge's recommended Order, which, in pertinent part, read as follows:

> 2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:
>
> (a) Request Mashkin Freight Lines, Inc., to reinstate John R. Catania, Jr., to his former position, or if it no longer exists, to a substantially equivalent position. If Mashkin Freight Lines, Inc., refuses to reinstate him, request the Company to waive the time limitation contained in the grievance provisions of the contract and, if the Company agrees to waive the time limitation, to process Catania's grievance diligently through to its proper conclusion.
>
> (b) Make John R. Catania, Jr., whole for any loss of earnings he may have suffered as a result of his discharge by Mashkin Freight Lines, Inc., from the date of that discharge, September 8, 1977, until he is reinstated by the Company or obtains other substantially equivalent employment or his grievance is diligently processed through to its proper conclusion. Backpay is to be computed in accordance with the

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

*The computations are as follows:

Total Net Quarterly Backpay	$31,864.16
Medical Expense	622.75
Total Backpay	32,486.91
Pension Contributions	2,553.52

[1] Catania had also filed a charge against Mashkin on February 6, 1978. That charge which was either dismissed or withdrawn alleged that Mashkin had discharged him because of his desire to join the Union and because of his refusal to drive under illegal conditions.

formula set forth in the section of this Decision entitled "The Remedy."

Subsequent to the Board's Order, Respondent entered into a stipulation with the Assistant General Counsel of the Board, agreeing to comply with the Order, but reserving its right to contest "the validity of the backpay computation." A controversy having arisen regarding the amount of backpay owing, the instant case was heard to resolve the various disputes.

II. THE BACKPAY CLAIM

As to the backpay period, the General Counsel asserts that it should run from September 8, 1977, to May 21, 1979, which is the date upon which Mashkin made an offer of reinstatement to Catania which was refused. The General Counsel concedes that the backpay period should exclude the period from September 8, 1977, to September 15, 1977, because Catania was unavailable for employment due to illness. Respondent argues alternatively that the backpay period should be cut off at various points between September 8, 1977, to May 21, 1979. Respondent's arguments will be set forth below.

Respondent and the General Counsel agreed to the accuracy of the gross backpay figures set forth at paragraph 5(c) of the backpay specification as amended. Also, there was no dispute concerning the accuracy of the medical expenses incurred by Catania after September 8, 1977, and the amount of pension contributions that would have been made on Catania's behalf if he had continued to be employed by Mashkin. Although Respondent disputes Catania's interim earnings, it does agree that the General Counsel's admission of net backpay as set forth in the specification is at least the floor upon which this calculation should be made. The following therefore is a chart[2] setting forth, on a quarterly basis from the third quarter of 1977 to the second quarter of 1979, Catania's gross backpay, his net interim earnings[3] as conceded by the General Counsel, his pension contributions, and his medical expenses. [This chart omitted from publication.]

Respondent initially contends that the Board in the underlying unfair labor practice case erred in ordering it to make Catania whole for loss of earnings suffered because of his discharge by Mashkin. In this respect, Respondent asserts in its brief:

> The ALJ must apportion the backpay between the Union and the Employer, and assess the Union only for the amounts that its refusal to handle the grievance added to the difficulty and expense of collecting from the Employer. Since the discharge was solely the Company's responsibility, if there was a breach of the contract, it has the onus to make Catania whole for all the wages and benefits lost. The Respondent must be exculpated for any backpay.

In support of the above assertion, Respondent cites, *inter alia*, *N.L.R.B.* v. *Local 485, International Union of Electrical, Radio and Machine Workers, AFL–CIO (Automotive Plating Corp.)*, 454 F.2d 17 (2d Cir. 1972), where the court refused to enforce a supplemental order of the Board awarding backpay against a union arising from its failure to represent an employee. In that case, the court, relying on decisions arising from suits brought by individuals against unions for unfair representation and against employers for breach of contract under Section 301 of the Act, concluded that liability should be apportioned against each with the primary liability for backpay apportioned against the employer. The court went on to say that the apportionment of liability applicable to Section 301 suits should be equally applicable to unfair labor practices against unions under Section 8(b)(1)(A) of the Act. Finally, the court indicated that the problem with holding the union fully liable for backpay, by virtue of its failure to represent an employee, is that no forum had determined the validity of the discharge in question and any assessment of backpay "might well be regarded as speculative and punitive."

With all due respect to the court's views on this subject, it must be said that they do not represent the views of the Board, whose decisions are binding on me. Moreover, Respondent's contention is an attempt to reargue the propriety of the order granted in the underlying case. As such, the contention is not, in my opinion, properly before me as I am bound by the Board's initial Order. With respect to the propriety of a backpay remedy in these types of cases, the Board adopted the Decision of Administrative Law Judge Michael O. Miller in *Service Employees International Union, Local No. 575, AFL–CIO (Convacare of Decatur d/b/a Beverly Manor Convalescent Center, et al.)*, 229 NLRB 692, 696 (1977). Administrative Law Judge Miller stated:

> It is not the function of the Board to decide the merits of a grievance in determining whether the refusal to process that grievance was violative of the Act; it is sufficient to determine from the record that the grievance was not "clearly frivolous. . . ."
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> * * * * *
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> However the uncertainty as to whether Evans' grievance would have been found meritorious, or would have otherwise been adjusted is a direct product of Respondent's unlawful action. Where as here, resolution of that uncertainty is required for the determination of monetary responsibility, it is proper to resolve the question in favor of the injured employee, and not the wrongdoer. Accordingly, for the purposes of remedy, I shall presume that if fully and fairly processed, Evans' grievance would have been found meritorious and that she would have been reinstated with backpay . . . .

[2] In addition to the interim earnings set forth above [omitted from publication], the record establishes that Catania earned $544.46 while working at a second job in 1979. Respondent argues that this should be included in interim earnings and the General Counsel opposes this contention.

[3] The parties agreed that any moneys which Respondent may be liable for as pension contributions should be first made to the pension fund administered by Respondent. They also agreed that if, for any reason, the pension fund declines to accept such moneys, they should be paid directly to Catania.

In addition to the above, Respondent makes the following contentions in its brief:

> 1. No backpay should be awarded for the period from September 15, 1977 to February 2, 1978 because Catania delayed the filing of his charge without substantial reason or cause.
> 2. No backpay should be awarded from February 27, 1977 onward because he refused a bona fide offer of employment from Mashkin Freight Lines.
> 3. Backpay must be recomputed for interim earnings which Catania could have earned but for (1) his refusal to accept suitable employment, and (2) his constructive quitting of suitable work. In addition, pension contributions should be reduced for such periods, as he refused such work, or constructively quit such work for employers obligated to make contributions to the pension fund. (Wonderbread, Holmes and Interstate.)
> 4. Backpay must be reduced by the amount of earnings at Newington Trailer Driver Training School in 1979.
> 4. Backpay should be terminated as of the date he accepted permanent employment with Mather Construction, in August 1978, because when he was offered reinstatement on May 15, 1979, he declined that offer to remain with Mather Construction Co.

With respect to the contention that backpay should not be awarded until the filing of the charge because of Catania's unreasonable delay in such filing, it is my conclusion that this assertion does not have merit. In determining backpay, the general rule followed has consistently been that a respondent is liable for the entire period of backpay from the date of discharge until such time as an offer of reinstatement has been made. Thus for example in *N.L.R.B.* v. *Seven Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 347 (1953), Justice Frankfurter stated:

> The Board's very first published Order awarded as back pay wages which would normally have been earned "during the period from the date of . . . discharge to the date of [an] offer of reinstatement . . . less the amount . . . earned subsequent to discharge. . . . For 15 years the Board followed the practice it had laid down in that case and calculated backpay on the basis of the entire period between discharge and offer of reinstatement . . . .

It is true, however, that prior to the enactment in 1947 of the 6-month statute of limitations set forth in Section 10(b) of the Act the Board had adopted a rule to the effect that backpay would be tolled where there had been an unexcused and unreasonable period of time between the occurrence of an unfair labor practice and the filing of the charge. See for example *Inland Lime and Stone Company*, 8 NLRB 944 (1938); *The Alexander Milburn Company*, 62 NLRB 482, 513 (1945); *Phoenix Mutual Life Insurance Company*, 73 NLRB 1463, 1465 (1947); *Red Arrow Freight Lines, Inc., et al.*, 77 NLRB 859, 862 (1947); *E. A. Laboratories, Inc.*, 87 NLRB 233 (1949). It also appears that this rule (essentially a doctrine of latches) has not been specifically overruled by the Board despite the enactment of the 1947 amendments and the incorporation of a 6-month statute of limitations in the Act. However, even prior to the enactment of the statue of limitations, it appears that the Board had evolved a 6-month rule in connection with defining what constituted an unreasonable delay in the filing of a charge. Thus, in *The Cleveland Worsted Mills Company*, 43 NLRB 545, 592 (1942), the Board stated:

> There are 3 other claimants against whom we have found the respondent discriminated whose jobs were not filled by new or former employees until after the settlement, but who filed charges within 6 months after jobs were so filled. As to these claimants also, we find that the usual back-pay remedy should not be denied. There remains however 11 claimants who were not included in the settlement and whose jobs had been filled more than 6 months before charges were filed in their behalf, and no extenuating circumstances are shown to excuse the delay in filing charges. We find that the policies of the Act will best be effectuated by denying back pay to them for the period prior to the date on which charges were filed on their behalf.

Given the decision in *Cleveland Worsted Mills Company, supra*, and the enactment in 1947 of the 6-month statue of limitations, it seems to me that a delay in the filing of a charge which does not extend beyond 6 months is not an unreasonable delay and that the doctrine of latches enunciated in the pre-1947 case no longer has any validity. Accordingly, I reject Respondent's contention in this respect and conclude that the backpay should run from September 15, 1977.

Respondent also contends that backpay should be tolled as of February 1978 because at that time Catania was offered unconditional reinstatement by Mashkin. According to the testimony of Jack Fennelly, he had a conversation with Board agent Peggy Ueda in February 1978, during the course of the investigation of this charge, in which he indicated to her that had Catania come to him earlier he might have been able to resolve his problems. Fennelly testified that Ueda asked him if he thought the Company could put Catania back to work and that he told her that he could work something out with the Company. He states that he then called Mashkin, spoke to John Mahon, and asked if there would be any objections to putting Catania back to work. According to Fennelly, Mahon said that he could be put back to work and that "there could be something worked out." Fennelly states that, after this phone conversation, he relayed the message to Ueda, telling her that the Company would make arrangements to put Catania back to work. He states that Ueda then said that she had to get a hold of Catania, whereupon she went into a separate office to make a phone call. According to Fennelly, when Ueda returned, she said that Catania wanted $5,000 along with reinstatement, to which he replied that he would have to call the Company. Fennelly testified that he then called Mahon and asked if the Company would pay $5,000 in addition to offering reinstatement. He states that Mahon said, "[N]o way is there

going to be any payment of $5,000, if he wanted his job he got it, if not that was it." At this point Fennelly states that he relayed Mahon's message to Ueda.

Mahon testified that in February he received a call from Fennelly asking if the Company would be willing to reinstate Catania. According to Mahon, he told Fennelly that the Company would be so willing. Mahon further testified that, a short time thereafter, Fennelly called and asked if the Company would be willing to pay $5,000 to Catania in addition to reinstating him. Mahon testified that he told Fennelly that the Company would not be willing to pay the $5,000 requested.

Catania's testimony regarding the phone conversation he had with Ueda in February 1978 essentially was that he received a phone call from her indicating that the Company might be willing to reinstate him to his former position of employment. He testified that at no time did he receive from her or anyone else a direct and unconditional offer of reinstatement, although he does acknowledge that during this phone call he may have asked Ueda whether a potential offer of reinstatement would be accompanied by any payment of backpay.

In connection with the purported offer of reinstatement in February 1978, Respondent subpenaed Ueda to testify in both the original proceeding and also in the instant backpay proceeding. In furtherance of the subpena, Respondent also requested the General Counsel's permission, in accordance with Section 102.118 of the Board's Rules and Regulations, to allow Board agent Ueda to testify in this proceeding. That request was denied. In substance, Respondent argues that had Ueda been permitted to testify in this proceeding she would have testified that, during her conversation with Catania in February, she relayed an unconditional offer of reinstatement by Mashkin. The General Counsel moved to quash the subpena to Ueda on the grounds that permission had not been granted by the General Counsel for the Board agent to testify and also on the grounds that any conversations she had with Catania related to an offer of compromise and was otherwise privileged. The motion to quash the subpena was granted by me. See *Stephens Produce Co., Inc. and Temple Stephens Company*, 214 NLRB 131 (1974), affd. 515 F.2d 1373 (8th Cir. 1975).

Putting the testimony of Fennelly and Mahon in the best possible light, I cannot construe their testimony as indicating that an unconditional offer of reinstatement was made through Ueda to Catania in February 1978. At best the testimony of Fennelly was to the effect that he called Mahon to find out whether or not the Company would be willing to reinstate Catania and was told that this could be done and that an arrangement might be made. The evidence is persuasive that based on their telephone conversation Ueda then contacted Catania informing him of the possibility of such reinstatement whereupon Catania inquired if backpay would also be offered. When backpay was not included in the "offer," the discussion thereupon ceased. It should be borne in mind that, at the time this transaction occurred, Ueda was investigating charges against both the Union and the Company which were filed by Catania, and was in the process of taking a statement from Fennelly at the time these conversations and phone calls took place. It is established that at no time subsequent to this meeting and until May 21, 1979, when Mashkin made a written offer of reinstatement to Catania, did either the Union or the Company make any independent unconditional offers of reinstatement to Catania, either orally or in writing. It is apparent to me that, at the time Ueda was informed by Fennelly of the possibility of Catania's reinstatement, she was acting in her capacity as an investigating agent of the Board and not as an agent of any of the parties in the proceeding. I therefore conclude, on the basis of the entire record in this case, that the evidence does not support Respondent's contention that an unconditional offer of reinstatement was conveyed by Mashkin through Fennelly and Ueda to Catania in February 1978.[4] Also, as no independent written offer of reinstatement was made to Catania until May 21, 1979, it is concluded that backpay is not tolled. See *Miscellaneous Drivers and Helpers Local 610, I.B.T. (Bianco Manufacturing Co., a Div. of Falcon Products, Inc.)*, 236 NLRB 1048, fn. 1 (1978), affd. 594 F.2d 1218 (8th Cir. 1979).

Respondent contends that the General Counsel should have included in the net interim earnings the amount of money Catania would have earned had he been employed by Union Carbide and that the inclusion of only $1,500 resulting from a settlement of a charge filed by him against that company was incorrect. In its brief, Respondent states:

> Since the complaint involved a substantial portion of the ULP period during which Catania was obligated to mitigate his loss of earnings and since the Regional Director had determined that there was probably cause to believe that Union Carbide had commited a ULP for which the public interest would have been vindicated by the payment of lost wages or earnings, the voluntary surrender of this claim approved by the Regional Director is analagous to a voluntary withdrawal from the labor market for this period during which backpay cannot be awarded. In effect, Catania and the Regional Director had voluntarily agreed that Catania's wages or interim earnings for this period was worth only $1,500 and such voluntary assessment of the loss requires the A.L.J. to consider that the backpay due for Respondent for the period is 0.

The record shows that on February 6, 1978, Catania had filed a charge against Union Carbide alleging that this company refused to hire him on November 17, 1977, because of his nonunion status. Union Carbide had a collective-bargaining agreement with Respondent. The record also establishes that on July 21, 1978, a complaint was issued against Union Carbide alleging that the refusal to hire was discriminatory in nature. On January 12, 1979, that company offered $1,500 to Catania in settlement of the complaint, which was accepted by him on January 16, 1979. This settlement was thereafter approved by the Regional Director on January 24, 1979.

[4] See *E. L. Barr and Merle Barr, a Co-Partnership, d/b/a Barr Packing Company*, 82 NLRB 1, 4 (1949).

It is my opinion that the matter concerning Catania's charge against Union Carbide is essentially irrelevant to this proceeding, except to the extent that he received $1,500 in settlement which the General Counsel concedes should be included as part of his interim earnings. Catania had never been offered employment by Union Carbide and was not offered employment by that company as part of the settlement agreement.

Catania therefore never worked for Union Carbide, and, apart from the ultimate possibility of receiving an offer of employment if he were successful in his litigation against Union Carbide, he had no prospect of being employed there during the backpay period. I cannot agree with Respondent's contention that Catania's settlement of his claim against Union Carbide amounted to a voluntary withdrawal from the labor market. The fact that the Regional Director had issued a complaint on his behalf can, in no way, be any assurance that after litigation his complaint would have been found meritorious. Moreover, I cannot conceive that a settlement of an unfair labor practice charge and Catania's decision not to become embroiled in a lengthy litigation can be construed as a withdrawal from the labor market. Clearly, during the time in question, Catania was at all times seeking employment and did in fact obtain various interim jobs which is reflected in the backpay specification and his testimony. I therefore reject the contentions made by Respondent regarding this matter and agree with the General Counsel that the only relevance of the settlement between Catania and Union Carbide is to provide $1,500 as part of Catania's interim earnings.

It is contended by Respondent that there were several instances where Catania either refused or quit substantially equivalent employment. Respondent asserts that each such occasion should serve to cut off Catania's right to backpay under the Board's Order.

In May 1978, Catania was offered and accepted a driver's job at a company called Arrow Hart. He was scheduled to begin his employment at that company on May 15, 1978,[5] and had been given credit cards and expense money for his first trip. Nevertheless, on May 14 Catania had his wife call Arrow Hart to decline the job and he thereafter returned the credit cards and expense money. As to the reasons for changing his mind, Catania testified that unlike his job at Mashkin, which primarily involved local driving, the job at Arrow Hart would have involved cross-country team driving, which meant that two drivers would alternate driving and sleeping on trips to the West Coast. Catania testified that he has four children, aged 8 to 15, and that he did not take this job because it would have been injurious to his health. For the same reasons, Catania testified that he rejected an offer for a cross-country driving job with a company called Drivers Leasing of Springfield, Connecticut.

In connection with Catania's refusal of the Arrow Hart job after his initial acceptance, and his refusal of the offer from Drivers Leasing, I do not believe that this should effect his backpay. It seems to me that the fact that both jobs offered him roughly comparable earnings as his job at Mashkin does not mitigate against the fact that they clearly would have been more burdensome to him and would have required him to be away from his family for significant periods of time. In this regard, although a discriminatee is obligated to mitigate his damages, that obligation does not compel him to accept any offer of employment. *Mastro Plastics Corporation and French-American Reeds Manufacturing Co., Inc.*, 136 NLRB 1342, 1349 (1962); *Sioux Falls Stock Yards Company*, 236 NLRB 543, 562 (1978). As I conclude that the duties required by these jobs would have been significantly more burdensome to Catania than his prior employment at Mashkin, I find that they did not constitute offers of substantially equivalent employment. *Sioux Falls Stock Yard Co., supra; Famet, Inc.*, 222 NLRB 1180, 1183 (1976). I also do not conclude that, by initially accepting the Arrow Hart job, Catania had obtained substantially equivalent employment within the meaning of the Board's Order in the underlying unfair labor practice case. Similarly, it is concluded that his refusal to accept a nondriving job at Newington Children's Home at $4 per hour does not affect his backpay as this was not equivalent employment to his job at Mashkin.

The record establishes that Catania had obtained driving jobs during the backpay period with Holmes Transportation Co. and Interstate Transportation Co. Both of these companies were covered by the terms and conditions of the Teamsters' National Master Freight Agreement and recognized Local 671, I.B.T., as the collective-bargaining representative of their respective employees. Accordingly, it is evident that, insofar as wages and other terms and conditions of employment, these jobs were substantially equivalent to the job which Catania had at Mashkin and were jobs involving essentially local driving.[6] The record establishes that, at Holmes, Catania worked during the weeks ending 12/3/77, 12/11/77, 12/18/77, 3/11/78, 3/25/78, and 4/1/78. At Interstate, Catania worked during the weeks ending 7/1/78, 7/8/78, 7/22/78, and 7/29/78.

Catania did not retain his jobs at Holmes and Interstate because he did not obtain membership in Local 671 as required by the collective-bargaining agreements. However, in both instances he was told respectively by the terminal manager of Holmes and the shop steward at Interstate that, in order to obtain membership in Local 671, he had to get himself "straightened out" with the Union. Catania interpreted this to mean that he was required to pay all back dues, fines, and assessments which he owed to Respondent before he could be accepted into membership in Local 671. In fact, his understanding of

[5] Prior to his employment at Mashkin, Catania had been employed by Arrow Hart. It appears that as of May 1978 the rate of pay for drivers at that company was $7 per hour and that the rate was $7.96 per hour in 1979. It also appears that the average spare driver (the job offered to Catania), employed by Arrow Hart during 1978, earned between $18,000 and $20,000 per year and earned between $22,000 and $25,000 per year during 1979.

[6] The record establishes that at Holmes Transportation Co. the average weekly earnings for drivers in 1978 was about $600 per week and that during 1979 the average weekly earnings was between $750 and $900 per week. At Interstate Transportation Co. the average weekly earnings during 1978 would have been about $500 a week because the drivers there generally worked less overtime.

these statements was precisely correct, as Richard Robidoux, Local 671's secretary-treasurer, testified that, with respect to employees who previously had been members of other Teamsters locals, it is the policy of Local 671 to condition membership on the payment of all moneys owed to the other local even if the individual left the industry before obtaining employment at the particular company under contract with Local 671. In a word, such a precondition for membership is unlawful where membership is required as a condition of continued employment under a union-security provision of a collective-bargaining agreement. *N.L.R.B.* v. *Spector Freight Systems, Inc., et al.*, 273 F.2d 272 (8th Cir. 1960). As such, Catania's loss of employment at Holmes and Interstate cannot be said to have been his fault or amount to a voluntary quitting on his part. Further, as membership in Local 671 was a condition of continued employment with such companies after 30 days of employment and as Catania did not meet that condition due to unlawfully imposed considerations, it cannot be said that Catania had obtained permanent positions at either company. He therefore did not obtain employment substantially equivalent to his job at Mashkin.[7]

In August 1978 Catania obtained employment as a construction foreman with Mather Corp. Although that company appears to have maintained a collective-bargaining agreement with Respondent, Catania was not part of the bargaining unit and therefore was not covered by the contract's terms. In this job Catania worked a 40-hour week on a salary basis and initially earned $350 per week. In May 1979, his salary was increased to $400 per week. Other than hospitalization benefits, he did not receive overtime or other benefits that he would have received as part of the agreement between Mashkin and Respondent. Catania testified that when he was employed at Mashkin he earned about $600 a week based on substantial overtime (he testified that he worked about 60 hours per week). The stipulation of the parties concerning the gross backpay representing what Catania would have earned if he had continued to be employed by Mashkin after September 8, 1977, shows that the range of Catania's earnings there would have been between $531 per week and $606 per week.

During the period of time that Catania was employed at Mather, he moonlighted at Newington Trailer Training in 1979 for which he was paid $544.46. Although Respondent asserts that this money should be computed into Catania's interim earnings, the General Counsel disagrees on the grounds that such earnings for a second job are not properly charged to interim earnings.

The record establishes that in August 1978, shortly after obtaining the Mather job, Catania was offered a job as a local route driver at Wonder Bread. This company also has a collective-bargaining agreement with Respondent, and it has similar wages and conditions as the agreement between Respondent and Mashkin. The record reveals that the average route driver at Wonder Bread works about 55 hours per week which is, in my opinion, essentially equivalent to the number of hours Catania would have worked at Mashkin during the period in question. Therefore, it appears to me that had Catania accepted the job offered by Wonder Bread this would have constituted substantially equivalent employment to his job at Mashkin. In explaining why he refused this job, Catania testified that he did so because he had obtained employment with Mather and because he feared reprisals from Respondent if he went to work at Wonder Bread. However, unlike the situations at Holmes and Interstate described above, there is no evidence to suggest that any illegal conditions would have been placed on Catania regarding his employment at Wonder Bread and there is no evidence of any conduct (other than Respondent's initial refusal to process his grievance in 1977) to indicate that Catania's fears of reprisal were anything other than subjective in nature.

As to the Mather job, it is my opinion that this was not substantially equivalent employment to Catania's employment at Mashkin. As noted above, his earnings from Mather were significantly lower than what he would have earned had he continued his employment at Mashkin and he did not enjoy the other benefits set forth in Mashkin's collective-bargaining agreement. I therefore conclude that, although Catania's earnings at Mather are properly attributable to intermim earnings, his acquistion of this job did not serve to cut off his backpay. *Sioux Falls Stock Yards Co., supra.*

It is my opinion, however, that the Wonder Bread offer which was declined by Catania sometime in August 1978 should serve to terminate Respondent's backpay liability. The Board's Order in the underlying case states that Catania should be made whole for lost earnings until he is reinstated by Mashkin, "or obtains other substantially equivalent employment or his grievance is diligently processed through to its proper conclusion." While there is nothing in the Order which specifically indicates that either a valid offer of reinstatement by Mashkin or a valid offer of substantially equivalent employment by another company would serve to cut off backpay, it seems to me that this properly should be read into the Order so be to conform to basic principles of equity. For if the Order is read literally, it would mean that Catania could, by his own actions, continue to keep the backpay running indefinitely simply by accepting nonequivalent employment and rejecting either an offer of reinstatement by Mashkin or substantially equivalent job offers made by other companies. In fact, the General Counsel seems to recognize that the Order should not be read literally because, despite its language to the effect that backpay

[7] In connection with Local 671's policy, I note that the testimony of Mr. Robidoux was as follows:

> JUDGE GREEN: Well I'm not sure I understand, are you saying that if somebody gets a job at Holmes and he was previously a member of some local teamsters union, the only way he could gain membership in your local would be to pay up whatever he owes to the other union.
>
> THE WITNESS: Correct your Honor that's our constitution.
>
> JUDGE GREEN: Well couldn't he just simply pay the initiation fees and dues required by your union?
>
> THE WITNESS: No, we'd have to turn it over to the other union because you always have to stay clean, that's the constitution. See like a lot of labor organizations, we give withdrawal cards and he has to get a withdrawal card; he has to straighten out with the last union he was in.
>
> JUDGE GREEN: Even if he has left the industry?
>
> THE WITNESS: Yes, correct.

would be tolled upon Catania's actual reinstatement by Mashkin, she concedes that Mashkin's May 21, 1979, reinstatement offer which was rejected by Catania should serve to end the backpay period. Moreover, under the Board's decision in *Mastro Plastics Corp., supra*, "if a claimant does willfully incur losses by either unjustifiably quitting or refusing substantially equivalent employment, he is not deprived of his entire claim but only so much of it as he would have earned had he retained or obtained in the interim job." As the record herein discloses that Wonder Bread offered a job which was substantially equivalent to Catania's job at Mashkin, and as there is no evidence that this job, had it been accepted, would have terminated prior to the end of the agreed-upon backpay period, it is reasonable to conclude that Catania would have continued to work at that job throughout the remainder of the backpay period and would not have suffered any further loss of earnings. I therefore find that this offer tolls the backpay.

Because it is not certain as to the actual date upon which the Wonder Bread offer was made in August, I shall fix the date as of the middle of that month. Thus, backpay shall be based on lost earnings from September 15, 1977 (excluding the period from September 8 to 15 due to Catania's illness), up to and including August 15, 1978. Since the third quarter figures for 1978 encompass a 13-week period from July 1 to September 30, I shall therefore halve the stipulated amount of gross backpay during that period. I shall also halve the amount set forth for pension contributions because under the Wonder Bread collective-bargaining agreement that company would have made the same pension contributions to the same fund. Thus, for the third quarter of 1978 gross backpay would be $3,856.59 and the pension contribution would have been $176.58. As the net interim earnings for that quarter are conceded by the General Counsel to have been $3,727.03, I conclude that the net backpay entitlement for Catania in this quarter is $129.56 plus $176.58 in pension contributions.

Having determined that Catania's refusal of the Wonder Bread job tolls his backpay as of the middle of August 1978, it is not necessary for me to consider whether his additional interim earnings from Newington Trailer Training Center in 1979 should have been included in his net interim earnings. Also, I shall not include Catania's expenditure of $74 for medical expenses made in the first quarter of 1979.[7]

Based on the above I find that Catania is entitled to backpay with interest as set forth below.

In summary, therefore, it is concluded that the total net backpay plus medical expenses due and owing to Catania is $21,306.79 and the total pension contribution due and owing is $1,294.20.

Upon the foregoing findings of facts, conclusions, and the entire record herein and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, Teamsters Local 559, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Newington, Connecticut, its officers, agents, and representatives, shall make John Catania, Jr., whole, by payment to him of the sum of $21,306.79, less tax withholdings as required by law with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). Additionally, Respondent shall tender to the pension fund on behalf of Catania's account the amount of $1,294.20 with whatever interest is customary and usual in the cases of late payments to said fund, except that, in the event the fund for any reason refuses to accept such money within 60 days of a final order in this case, said sum of money shall be paid, with interest, directly to Catania.

CALENDAR QUARTERS	*GROSS BACKPAY*	*NET INTERIM EARNINGS*	*NET BACKPAY*	*MEDICAL EXPENSES*	*TOTAL*	*PENSION CONTRIBUTIONS*
1977–3	$ 749.79	$ 0	$ 749.79	$334.00	$1,083.79	$ 63.80
1977–4	6,906.84	643.00	6,263.84	9.25	6,293.09	326.25
1978–1	7,419.52	1,119.00	6,300.52	205.50	6,506.02	322.82
1978–2	7,587.74	293.41	7,294.33	0	7,294.33	404.75
1978–3	3,856.59	3,727.03	129.56	0	129.56	176.58

[7] As to Respondent's contention that the Order herein should require Catania to repay any unemployment insurance benefits received during the backpay period, this is rejected. *N.L.R.B.* v. *Gullett Gin Co.*, 340 U.S. 361, fn. 1 (1965).

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.